Supreme Court, U.S.
FILED
MAY 17 2002
OFFICE OF THE CLERK

No. 01 1706

IN THE

Supreme Court of the United States

ALAN OVERY

Petitioner

v.

CYNTHIA MURPHY AND DAVID MURPHY

On Petition For Writ of Certiorari
To The Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

Alan Overy
Pro Se Petitioner
10674 Pecan Drive
Fairhope, Alabama 36532
(251) 990-9308

27 pg

Questions for review:

1. Was the Defendant deprived of his constitutional and due process rights by the actions of a trial court judge?

2. Has the Defendant's right of appeal been unconstitutionally barred by the actions of the Alabama appeals courts?

3. Has the Defendant's right of appeal been unconstitutionally constrained by the failure of the Court Reporter to maintain an accurate transcript of the trial?

List of parties:

Plaintiffs/Appellees:

Cynthia Murphy

David Murphy

Represented by counsel:

Karol J. Kemp

Wilkins, Bankester, Biles & Wynne

Post Office Box 1367

Fairhope, Alabama 36533

(251) 928-1915

Defendant/Appellant:

Alan Overy

10674 Pecan Drive

Fairhope, Alabama 36532

(251) 990-9308

Table of contents:

Table of authorities 1

Procedural history 2

Basis for jurisdiction 3

Argument

Question 1 4

Question 2 8

Question 3 11

Table of authorities:

Case authority:

First Bank of Boaz v. Fielder, ... 5
590 So.2d 893 (Ala.1991)

Offutt v. United States, ... 5
348 US 11, 14 L.Ed 11, 75 S.Ct 11.

Southeastern Exp. Co. v. Miller, ... 9
264 US 541, 44 S.Ct 424

Statutory authority:

Rule 58(a), Ala. R. Civ. P. 10

Procedural history:

On December 7 and 8, 2000, a jury trial was held in Baldwin County, Alabama. A verdict was returned in favor of the Plaintiff, David Murphy, but he was awarded no damages. A verdict was returned in favor of the Plaintiff, Cynthia Murphy, with an award of Zero and 00/100 ($0.00) Dollars in compensatory damages and Ten Thousand and 00/100 ($10,000.00) in punitive damages. The trial judge notified the jury that their verdict was inconsistent and sent them back to deliberate. After two minutes of additional deliberation, the jury changed the verdict to include One Hundred and 00/100 ($100.00) Dollars in compensatory damages.

On December 20, 2000, the verdict was entered by the trial judge, and on January 2, 2001, the Circuit Clerk entered the judgment and sent notice. A post judgment motion was filed on January 9, 2001, and denied by the trial court on January 16, 2001.

On February 28, 2001, an appeal was filed with the Alabama Court of Civil Appeals, which dismissed the appeal as untimely on October 12, 2001. The case was then appealed to the Alabama Supreme Court, which upheld the Court of Appeals without written opinion. From that decision, this writ is filed.

Basis for jurisdiction:

The basis for jurisdiction is the denial of the fundamental constitutional right of due process of law guaranteed by the Seventh Amendment to the United States Constitution. The writ to this Honorable Court comes after the denial by the Alabama Supreme Court, the highest court in Alabama, to hear this appeal.

I, as a Defendant in a civil jury trial, have been denied my rights to a fair hearing and appeal. It is the actions of the Alabama court system, its Justices, Judges and Court employees which have deprived me of my fundamental Constitutional rights. It is the actions of the Alabama court system which have prompted this Petition.

Argument:

Question 1: Was the Defendant deprived of his constitutional and due process rights by the actions of a trial court judge?

On December 7 and 8, 2000, a civil jury trial was held at the Baldwin County, Alabama, courthouse. After two days of conflicting testimony from the Plaintiffs, and the admission by a witness for the Plaintiffs, Valerie Haynes, that the lawsuit was a scam to obtain money from me, the jury, after three and one-half hours of deliberation, late on Friday evening, returned a verdict in favor of the Plaintiffs. The jury awarded no compensatory damages, but the Plaintiff was awarded the sum of ten thousand and 00/100 ($10,000.00) dollars in punitive damages[1]. After the finding of the jury was announced, the trial judge sent the jury back to deliberate in order to assess compensatory damages. Obedient to the trial judge's request, and with no further recorded instructions, the jury, after only two additional minutes of deliberation, assessed one hundred and 00/100 ($100.00) dollars in

---

[1] "... we the jury find for the Plaintiff Cynthia Murphy and against the defendant Alan Overy and assess damages at, compensatory damages, zero and punitive damages ten thousand for a total damages of ten thousand dollars."

Trial transcript page R-366.

compensatory damages against me, thereby allowing the Plaintiff to collect her punitive damage award[2].

Under Alabama law, the punitive damage award would not stand if no award of compensatory damages existed[3]. In the case at bar, the trial judge did not instruct the jury of that fact; but when the jury returned an award of no compensatory damages, he informed the jury that their verdict was inconsistent. The record, although incomplete as to off the record recommendations made to the jury, clearly establishes the fact that the original jury verdict was not inconsistent with the judge's instructions.

The United States Constitution allows all Defendants a right to a fair trial free from interference[4].

---

[2] "THE COURT: All right. Ladies and Gentlemen, have you gone back and deliberated again?

A JUROR: Yes.

THE COURT: Is this your verdict, 'we the jury find for Cynthia Murphy and against Alan Overy and assess damages at one hundred dollars, punitive damages at ten thousand dollars for total damages of ten thousand, one hundred dollars.' Signed Lisa McGahey foreperson."

Trial transcript page R-367

[3] *First Bank of Boaz v. Fielder*, 590 So.2d 893 (Ala.1991)

[4] "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system always endeavored to prevent even the probability of unfairness." *Offutt v. United States*, 348 US 11, 14 L.Ed 11,

In the present case, I, as the Defendant, was deprived of my rights when the trial judge required that the jury to change its verdict. The trial judge clearly overstepped his authority in his requirement that the jury change its award of damages.

It was the conclusion of the jury that the Plaintiffs' failed to establish damages. An essential element of the causes of action filed by the Plaintiffs was that they sustained damages. The jury, after a full hearing of the case, and after due deliberation, came to the conclusion that the Plaintiffs suffered no financial or physical harm. After this fact was announced, the jury was informed that they had issued an inconsistent verdict.

The trial judge instructed the jury that they "are the sole judges of what amount of damages should be assessed."[5] The only instruction which the trial judge issued that may have caused inconsistency was the instruction that "you may, in your discretion assess punitive damages by way of punishment although the actual injury is purely nominal."[6]

The jury evaluated the evidence, assessed damages, and returned a verdict which awarded the Plaintiffs no compensatory damages. It was the responsibility of the

---

75 S.Ct 11.

[5] Trial transcript R-356

[6] Trial transcript page R-344

trial judge to accept this judgment, and by law void the punitive damage award. It was not his place to require the jury award the Plaintiff compensation.

The fact that the trial judge required the jury deliberate further, rather than accepting their original verdict, deprived me of my right to a fair trial. Therefore this Honorable Court should grant certiorari, and reinstate the original jury verdict.

Question 2: Has the Defendant's right of appeal been unconstitutionally barred by the actions of the Alabama appeals courts?

The system of justice established in the United States grants to all the right to appeal a judgment which was unjust. In the present case, although I attempted to exercise my right to appeal, the Alabama courts and justice system barred this attempt.

Following the trial of the case at bar, I expressed my intention to appeal this case. I contacted the Office of the Circuit Clerk of Baldwin County, Alabama, and the Honorable Judge Wilters, a fact confirmed by Plaintiffs' attorney in a letter dated December 18, 2000, but was informed that no appeal could be taken until the judgement had been finalized by the trial judge and entered by the Circuit Clerk. When I was notified of the fact that the judgement was final, I immediately filed a post judgment motion, which was later denied. From the denial of the motion, I, within the proper time, filed an appeal to the Alabama Court of Civil Appeals.

The Alabama Court of Civil Appeals ruled that the appeal of this case was untimely filed due to the fact that my motion did not toll the running of the appeal time. Although the Plaintiffs' attorney never raised the issue of the timeliness of the appeal, the Court of Civil Appeals, on their own, found in favor of the Plaintiffs and dismissed the appeal as untimely filed. This Honorable Court has ruled on several occasions that a court of

appeals should only address those issues in dispute, and briefed by the parties, and not address issues which have not been raised by the parties[7]. The Alabama appeal courts have not followed this principle in this case. The Court of Civil Appeals raised the issue of the timeliness of the appeal and rendered it's decision based solely on this issue, even though it was never raised by the Plaintiffs.

Although the court was well within its rights to rule on an issue of jurisdiction, the court was wrong to dismiss this appeal based on the issue. The trial court and the Plaintiffs both accepted my motion as timely filed. If there was a problem with the late filing of the motion, the Plaintiffs or the trial judge should raised the issue on the hearing of the motion. By the judge hearing the motion, and then ruling on the motion, the appeal which followed was based upon the judge's denial of the motion and was not untimely filed.

I contacted the Circuit Clerk regarding the appeal of this case and even ordered and paid for the trial transcripts by December 19, 2000, eleven days after the verdict, well within the appeal time. The Clerk informed me that I could not file notice of appeal until the judgment had been rendered by the trial judge. After the judgment was rendered, I followed all proper steps in a

---

[7] "The Supreme Court of the United States will not consider assignments of error appearing in the record, but not mentioned in the argument." *Southeastern Exp. Co. v. Miller*, 264 US 541, 44 S.Ct 424

timely manner in order to perfect my appeal.

The Alabama Court of Civil Appeals, in its opinion, stated that they had sympathy for a pro se Defendant, but the rules are the rules. In this case I was deprived of my ability to appeal the verdict against me due to the fact that the Circuit Clerk prohibited my appeal until the trial judge issue a verdict.

It is true that under Alabama law that a jury verdict is a final judgment the date it is issued and the act of the trial judge entering it on the summary sheet is only a ministerial function[8]. The problem is with the reality which exists; the Circuit Clerk will prohibit any appeal until this ministerial act is completed.

I was informed by all responsible officials I would be notified as soon as the verdict was entered. When notified, I followed all proper steps to perfect my appeal, with no objections from any party. It was not until the Court of Civil Appeals dismissed the appeal that it was known there was a problem with the timing of the appeal.

The constitution and federal law allow a Defendant the right to appeal. The actions of the government officials have deprived me of this constitutional and legal right.

---

[8] Rule 58(a), Ala. R. Civ. P.

Question 3: Has the Defendant's right of appeal been unconstitutionally constrained by the failure of the Court Reporter to maintain an accurate transcript of the trial?

The appellate system is designed to review court proceedings based solely on the recorded compiled by the clerk and the transcript complied by the court reporter. In an age of great advances in technology, it seem that the system of justice in the United States could find better means of compiling a court transcript than based on the hearing and typing ability of a single court reporter.

In the current case, I contend that the transcript of trial contains a multitude of errors, including a large number of deletions. I have requested corrections or verifications of the record, but my attempts have been futile. My sole ability to prosecute my appeal is based entirely upon an incomplete and incorrect trial transcript.

It is my contention that the only remedy to the problem is a new trial which can be audio taped in order to produce a true depiction of the events which occur.

ALABAMA COURT OF CIVIL APPEALS

October Term, 2001-2002

2000590

Alan Overy

v.

Cynthia Murphy and David Murphy

Appeal from Baldwin County Circuit Court
(CV-00-342)

THOMPSON, Judge

Cynthia Murphy filed a complaint against Allan Overy, seeking damages on claims of assault and battery, invasion of privacy, and the tort of outrage. Cynthia Murphy's husband, David Murphy, also sued Overy in the same case; he sought damages for an alleged loss of consortium. The case proceeded to a jury trial. The jury returned a verdict in favor of Cynthia Murphy on her claims against Overy; it awarded her $100 in compensatory

damages and $10,000 in punitive damages. The jury returned a verdict in favor of David Murphy on his claim for loss of consortium, but it awarded him no damages.

On December 8, 2000, the trial court entered a judgment on the jury's verdict on the case action summary sheet. A notation on the case action summary indicates that the judgment was "filed December 20, 2000"; based on other entries on the case action summary, we understand this notation to mean that the judgment was filed in the clerk's office on December 20, 2000. On January 9, 2001, Overy filed a postjudgment motion; the trial court denied that motion on January 16, 2001. On February 28, 2001, Overy appealed.

Although neither party has addresses the issue, this court must determine whether it has jurisdiction over this appeal. Jurisdictional matters are of such importance that a court may take notice of them ex mero motu. Nichols v. Ingram Plumbing, 710 So. 2d 454 (Ala. Civ. App. 1998).

"The timely filing of a notice of appeal is a jurisdictional act." Rudd v. Rudd, 467 So. 2d 964, 965 (Ala. 1985). The date on which the trial court's judgment was actually rendered determines the timeliness of this appeal.

A trial court may "render" a judgment by making a notation on the case action summary, and such a notation constitutes the "entry" of the trial court's judgment. See Rule 58(a) and (c), Ala. R. Civ. P. In Smith v. Jackson, 770 So. 2d 1068 (Ala. 2000), our supreme court addressed the rendition of judgments on case action summaries:

> "This Court has recently explained:
>
> > "Pursuant to Rule 58(c), Ala. R. Civ. P., [n]otation of a judgment or order on separately maintained bench notes or in the civil docket or the filing of a separate judgment or order constitutes the entry of the judgment or order.' 'Rule 58 ... obliterate[s] any distinction between [the ministerial act of] entry and [the judicial act] of rendition of judgment and ... make[s] the operative event the act of the judge." 2 Champ Lyons, Jr., Alabama Rules of Civil Procedure Annotated, Section 58.2, at 255

> (3d ed. 1996). However, when a judge renders a judgment by a separate written order, that judgment is not entered until it is filed in the clerk's office. See Lacks v. Stribling, 406 So. 2d 926, 930 (Ala. Civ. App.), cert. denied, 406 So. 2d 932 (Ala. 1981). Thus, although under Rule 58(c), rendition and entry of judgment occur simultaneously when the trial judge notes the judgment on the case action summary sheet or on separately maintained bench notes, see Rule 58, Ala. R. Civ. P., Committee Comments on 1973 Adoption, the Rule nevertheless preserves the distinction between rendition and entry of judgment when the trial judge renders judgment 'by executing a separate written document,' Rule 58(a), Ala. R. Civ. P."

770 So. 2d at 1071-72 (emphasis added). See also Doe v. Markham, 776 So. 2d 757, 760-61 (Ala. 2000).

In this case, the trial court noted and signed its judgment on the case action summary on December 8, 2000. See also Asam v. City of Tuscaloosa, 585 So. 2d 60 (Ala. Civ. App. 1991). Therefore, we conclude that the December 8, 2000, entry on the case action summary

constituted the entry of the trial court's judgment. Doe v. Markham, supra. See also Harris v. MedStar, Inc., [Ms. 19992175, Feb. 07, 2001] ___ So. 2d ___ (Ala. 2001). Overy filed his postjudgment motion on January 9, 2001, beyond the 30 days allowed by Rule 59, Ala. R. Civ. P., for the filing of a postjudgment motion. Thus, Overy's postjudgment motion was untimely and did not work to extend the time for taking an appeal from the trial court's December 8, 2000, judgment.[1] Overy filed his notice of appeal on February 28, 2001, well beyond the 42 days from the entry of judgment allowed by Rule 4(a), Ala. R. App. P.

---

[1] Assuming that Overy's January 9, 2001, motion had been timely, we note that the 42d day from the January 16, 2001, order purporting to deny that "postjudgment motion" was February 27, 2001. See Rule 4(a), Ala. R. App. P. February 27, 2001, was the legal holiday for Mardis Gras in Baldwin County. Therefore, had the January 9, 2001, "postjudgment motion" been timely, Overy's last day to appeal from the denial of that "motion" would have been February 28, 2001.

While we are not unsympathetic to pro se litigants such as Overy, a pro se litigant must nonetheless comply with legal procedure and court rules. Jones v. Seibert, 624 So. 2d 639 (Ala. Civ. App. 1993). "[T]he operation of the courts of this state is governed by rules which are no more forgiving to a pro se litigant than to one represented by counsel." Black v. Allen, 587 So. 2d 349, 349 (Ala. Civ. App. 1991). See also Lockett v. A.L. Sandlin Lumber Co., 588 So. 2d 889 (Ala. Civ. App. 1991).

We conclude that this appeal is untimely and, therefore, that it is due to be dismissed.

DISMISSED.

Yates, P.J., and Crawley, Pittman, and Murdock, JJ., concur.

12 th day of October 2001

October 11, 2001

THE COURT OF CIVIL APPEALS OF ALABAMA

RE: 2000590

Alan Overy v. Cynthia Murphy and David Murphy (Appeal from Baldwin County Circuit Court: CV 00-342).

You are hereby notified that the following action was taken in the above cause:

Appellees' motion to strike is DENIED.

/s/
John H. Wilkerson, Jr., Clerk
Court of Civil Appeals

Court of Civil Appeals
300 Dexter Avenue
Montgomery, AL 36104-3741
(334) 242-4095

November 30, 2001

THE COURT OF CIVIL APPEALS OF ALABAMA

RE: 2000590

Alan Overy v. Cynthia Murphy and David Murphy (Appeal from Baldwin County Circuit Court: CV 00-342).

You are hereby notified that the following action was taken in the above cause by the Court of Civil Appeals:

Application for Rehearing Overruled. No opinion written on rehearing.

/s/
John H. Wilkerson, Jr., Clerk
Court of Civil Appeals

Court of Civil Appeals
300 Dexter Avenue
Montgomery, AL 36104-3741
(334) 242-4095

IN THE SUPREME COURT OF ALABAMA

(Seal)

February 22, 2002

1010603

Ex parte Alan Overy. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Cynthia Murphy and David Murphy) (Baldwin Circuit Court: CV 00-342; Civil Appeals: 2000590).

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

Writ Denied-No Opinion

LYONS, J.-Moore, C.J., and Houston, Johnstone, and Woodall, JJ., concur.

(Handwritten)

9/30/00

Valerie Haynes
21672 Hwy 98 E Lot 1-A
Foley, AL 36535

Dear Alan Overy:

I recently heard that David and Cindy Murphy have started a lawsuit against you. I wanted to write you this letter to let you know about some things that had been going on. Cindy came over to my trailer on more than one occassion [sic] earlier this year. She was trying to persuade me and my husband to help them with their scam. They wanted me to say that you had been letting yourself into my trailer and various other things. They told us that were gonna get rich, because you had to go to England to settle your mother's estate and you were going to recieve [sic] millions. I wanted to let you know that none of this is true about you coming into my house. I never made any allegations against you. If you need me to testify please let me know. I will be glad to help in any way I can.

/s/ Valerie Haynes

(Letterhead)

December 18, 2000

Mr. Alan Overy
10674 Pecan Drive
Fairhope, AL 36532

Dear Mr. Overy:

It is my understanding that you have called my office on at least one occasion since the trial. You have also contacted Leslie with Judge Wilter's office since the trial. With regard to your allegations concerning the video tape that was introduced into evidence, let me respond by saying that I advised you that I would hold on to the video tape and have it available at trial. Once an item is introduced into evidence, it cannot be returned until such time as the case is completed and there are no further appeals by either side. I am certain that in the event you do not appeal the verdict of this case, once the appeal time has run, you could ask the Court to return this video tape to you if you so desire. However, you had indicated to me at the trial that the video tape was merely a copy of the original video tape shown and therefore I do not understand why you are so upset about receiving this video tape when you have the original in your possession.

Finally, I do not appreciate the allegations that I am a "liar" regarding returning this video tape to you.

Those are very serious allegations and I would urge you to watch your tongue in making such serious allegations about me especially in light of my personal reputation.

In the event that you are not appealing this matter, I would expect to receive full payment from you in certified funds made payable to Wilkins, Bankester, Biles & Wynne, P.A. In case you are not aware, interest accrues on a judgment at the rate of 12% annually. There is no further need for you to contact myself or my office, other than to deliver the funds.

Sincerely.

/s/
Karol J. Kemp

Wilkins, Bankester, Biles & Wynne, P.A.

KJK/jej

Cc: David and Cindy Murphy